INDEX.

	Page.
Statement of facts	1–7
Assignments of error	8
Brief of argument	9–52
(1) The finality of the findings of fact and conclusions of the Federal Trade Commission, "when supported by testimony," is similar to the finality attributed by this court to the Interstate Commerce Commission's findings and conclusions in "nonreparation" cases	10
(2) The Circuit Court of Appeals was without jurisdiction to set aside the order of the Federal Trade Commission	21
A. What the court actually did by its order	21
B. The Commission is not required to find a general practice	26
C. If the Commission or courts were to determine that an "unfair method" affected the public they would be usurping a legislative function already exercised by Congress when it declared unfair methods to be unlawful	28
D. Congress granted the Commission discretion as to when it should proceed against one charged with unfair methods of competition	29
E. The Circuit Court of Appeals reviewed acts within the discretion of the Commission	31
(3) The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the opinion of Judge Baker in the Seventh Circuit in the case of *Sears, Roebuck & Company, petitioner* v. *Federal Trade Commission* (258 Fed. 307)	33
(4) The court erred in holding that "there was no evidence to support any general practice of respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of bagging" (record, p. 481)	37
(5) The manner of sale and distribution of ties and bagging followed by respondents is known as "full-line forcing," and is economically an unfair method of competition, under the public policy evidenced by the Federal Statutes	46
Conclusion	52

AUTHORITIES CITED.

	Page.
Sears Roebuck & Co. v. *Federal Trade Commission*, 258 Fed. 307	9, 20, 27, 33, 34, 45
34 Stat. L. ch. 3591, p. 584	10
B. & O. R. R. Co. v. *Pitcairn Coal Co.*, 215 U. S. 481, 489	15
Kansas City So. Ry. Co. v. *United States*, 231 U. S. 423	16
Pennsylvania Co. v. *United States*, 236 U. S. 351	17, 18
Manufacturers Railway Co. v. *United States*, 246 U. S. 457	17, 18, 19
Illinois Central R. R. Co. v. *Interstate Commerce Commission*, 206 U. S. 441, 455	18, 22
Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184, 196.	18, 22
Mitchell Coal & Coke Co. v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 257, 259	18, 22
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 259	27
Standard Oil Co. v. *United States*, 221 U. S. 1, 42–43	28
International News Service v. *Associated Press*, 248 U. S. 215	28, 46
Loewe v. *Lawlor*, 208 U. S. 274, 294–295	34

APPENDIX.

Findings of fact and conclusions of law by Commission	53
The Federal Trade Commission act, section 5	59
Similarity of Federal Trade Commission act and Interstate Commerce Commission act, as shown by the proceedings in Congress	63

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FEDERAL TRADE COMMISSION, PETITIONER,

v.

ANDERSON GRATZ AND BENJAMIN GRATZ, copartners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co.; and Charles O. Elmer, respondents.

No.—.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

STATEMENT.

This case comes up on a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, rendered in the above-entitled case on the 14th day of May, 1919, which judgment set aside an order of the Federal Trade Commission, requiring respondents to cease and desist from certain alleged unfair methods of

competition. The writ was granted on the 20th day of October, 1919.

The findings and conclusion are set forth in the appendix to this brief.

The Federal Trade Commission issued a complaint against the above-named respondents, calling on them to show cause why they should not be required to desist from certain unfair methods of competition against other manufacturers and distributors of jute bagging, sugar-bag cloth, and rewoven second-hand bagging.

The facts are that respondents, Warren, Jones & Gratz, have their principal office and place of business in the city of St. Louis, Mo. Respondents, P. P. Williams & Company, are a copartnership, with principal place of business at Vicksburg, Miss., and respondent, C. O. Elmer, has his place of business in New Orleans, La. All are engaged in interstate commerce in the United States in the sale and distribution of steel ties used for the binding of bales of cotton and jute bagging used for covering the bales. Williams & Company and Elmer are the general selling and distributing agents for the steel ties manufactured by the Carnegie Steel Company, amounting to 59 per cent in 1916 and 65 per cent in 1917, respectively,[1] of all those used in the

[1] By an inadvertent typographical error the findings stated the amount of steel ties manufactured by the Carnegie Steel Company to be 75 per cent of all those used in the cotton baling business in the Southern States. This error was corrected in the brief and was called to the attention of the court in oral argument by the chief counsel of the commission. Subsequently when the petition for writ of certiorari and brief were prepared there was a new chief counsel, and in preparing his brief he reproduced the error as found in the findings in the record.

cotton baling business in the Southern States, and are the general selling and distributing agents of the American Manufacturing Company, which produces 45 per cent of all the jute bagging for said purposes. Anderson Gratz, of the firm of Warren, Jones & Gratz, was one of the active officers and one of the vice presidents of the American Manufacturing Company.

The firm of Mente & Company, of New York City and New Orleans, distributes material known as sugar-bag cloth in the cotton-growing States, which is used for wrapping cotton bales. The Carolina Bagging Company of North Carolina sells and distributes throughout the cotton-growing States the material known as rewoven bagging, which is also sold by other corporations.

Warren, Jones & Gratz and the other respondents had within the last three years previous to filing of the complaint adopted and practiced the policy of refusing to sell steel ties to those dealing with them unless they also purchased a corresponding amount of jute bagging.

The Carnegie Steel Company dominates the steel tie situation to such a degree that it fixes and controls the price of ties throughout the United States. The Ludlow Manufacturing Association, of Boston, Mass., manufactures and sells jute bagging to the extent of about 20 per cent of the amount used. There is also secondhand and sugar-bag cloth used in the industry amounting to 35 per cent of the total.

Respondents in many instances refused to sell to purchasers ties unless they bought a corresponding amount of bagging, and purchasers were compelled to buy bagging in order to get ties.

The Commission found that the refusal to sell steel ties to purchasers unless they bought jute bagging was an unfair method of competition in interstate commerce against other manufacturers, dealers, and distributors of jute bagging, sugar-bag cloth, and rewoven secondhand bagging in violation of the provisions of section 5 (Appendix, p. 59) of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat., Chap. 311, p. 719), and ordered the respondents to cease and desist from the said policies and practices.

An appeal was taken by respondents to the United States Circuit Court of Appeals for the Second Circuit, under the Federal Trade Commission Act.

That statute provides that the findings of fact of the Commission are conclusive if supported by testimony.

The Commission's findings of fact and its conclusion are, in part, as follows:

> *Paragraph 2.*—That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners doing business under the firm name and style of P. P. Williams & Com-

pany; and C. O. Elmer adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging * * *.

Paragraph 4.—* * * The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties also to buy from them bagging manufactured by the American Manufacturing Company, and in many instances said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company from said respondents in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

CONCLUSIONS OF LAW.

That the methods of competition set forth in the foregoing findings as to the facts, in paragraphs 1, 2, 3, and 4, and each and all of them, are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers, and distributors of jute bagging and against other dealers and distributors in the material known as sugar bag cloth, and against manufacturers, dealers, and distributors of the bagging known as rewoven bagging and secondhand bagging, in violation of the provisions of section 5 of an

act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of section 3 of an act of Congress known as the Clayton Act.

The court held that—

> There is testimony to support the findings of fact, and therefore the question before us is whether they do support the Commission's conclusion of law that the method of competition forbidden is unfair within the meaning of section 5 of the act of September 26, 1914. (Record, p. 480.)
>
> * * * * *
>
> That unfair methods of competition between individuals are not contemplated by the act. * * * We think the unfair methods, though not restricted to such as violate the antitrust acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the antitrust acts. (Record, p. 480.)
>
> As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging

and that the Commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed. (Record, p. 482.)

The petitioner maintains that the substantive law under which it functions is analogous to that which the the Interstate Commerce Commisssion administers, and that the Federal Trade Commision should be accorded the same discretion in determining whether a method of competition is unfair as has been held by this court to be the discretion of the Interstate Commerce Commission in determining what is an unreasonable rate or an unjust practice; that in the light of decisions in "nonreparation" interstate commerce cases it is not within the province of the lower court to review the ultimate finding of an unfair method of competition by the petitioner where there is testimony to support the finding, unless there is a constitutional question involved, the Commission has exceeded its delegated authority, or has acted arbitrarily; that the court erred in reversing the petitioner's order since none of the three foregoing exceptions were involved; that as there was evidence to support the findings they were conclusive; that said court also erred in setting aside said order on the ground that there was no "general practice" affecting the public shown by the evidence since the statute does not permit of a review of the evidence on such grounds; that the record, however, does contain evidence of a general practice affecting the public.

ASSIGNMENTS OF ERROR.

The petitioner hereby assigns the following errors in the opinion and judgment of the Circuit Court of Appeals:

(1) In setting aside the order of the Federal Trade Commission;

(2) In setting aside the order of the Commission when the findings were supported by testimony;

(3) In reviewing and weighing the evidence and setting aside the order of the Commission when the findings were supported by testimony;

(4) In holding that the findings did not support the ultimate fact of an unfair method of competition in commerce in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes";

(5) In holding that the findings of fact and conclusion should be set aside on the ground that the Federal Trade Commission does not have jurisdiction of an act involving an unfair method of competition in commerce unless a "general practice" affecting "the public generally" is established by the evidence;

(6) In holding that the Commission does not have jurisdiction to entertain cases involving unfair methods of competition between individual competitors.

BRIEF OF ARGUMENT.

First.

The finality of the findings of fact and conclusion of the Federal Trade Commission, "when supported by testimony," is similar to the finality attributed by this Court to the Interstate Commerce Commission's findings and conclusions in "nonreparation" cases.

Second.

The Circuit Court of Appeals was without jurisdiction to set aside the order of the Federal Trade Commission.

Third.

The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the opinion of Judge Baker in the Seventh Circuit in the case of *Sears, Roebuck & Company, petitioner,* v. *Federal Trade Commission,* 258 Federal 307.

Fourth.

The Court erred in holding that "there was no evidence to support any general practice of respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of bagging." (Record, p. 481.)

Fifth.

The manner of sale and distribution of ties and bagging followed by respondents is known as "full-line forcing," and is economically an unfair method of competition, under the public policy evidenced by the Federal statutes.

ARGUMENT.

FIRST.

The finality of the findings of fact and conclusion of the Federal Trade Commission, "when supported by testimony," is similar to the finality attributed by this Court to the Interstate Commerce Commission's findings and conclusions in "non-reparation" cases.

The discussion in this case revolves around the substantive law in the Federal Trade Commission Act contained in the following language of Section 5: "that unfair methods of competition in commerce are hereby declared unlawful." The foregoing phrase is analogous to that part of section 1 of the Interstate Commerce Act, which is as follows: "and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." (34 Stat., ch. 3591, p. 584.)

In view of the fact that the Federal Trade Commission Act, and particularly the substantive part dealing with unfair methods of competition, was fashioned by Congress after the substantive part of the Interstate Commerce Commission Act dealing with "unjust and unreasonable" charges, attention is here called to the history of the passage of the Federal Trade Commission Act, in order to demonstrate wherein the two acts parallel.

The undisputed declarations in the debates showing that Congress was attempting to create a com-

mission to handle unfair methods of competition in commerce similar to that of the Interstate Commerce Commission in its control of "unjust and unreasonable" rates are too numerous to set forth in a brief. (An index to the debates on this subject will be found in the appendix herein.)

Light may be obtained from other congressional sources. In the Sixty-second Congress, Senate resolution No. 98 (62d Cong., 3d sess., Rept. No. 1326), authorized the Committee on Interstate Commerce to report to the Senate changes in the laws necessary to the creation and control of corporations engaged in interstate commerce. In response to the resolution hearings were held and a report made on the 26th day of February, 1913 (S. Rept. 1326, 62d Cong., 3d sess., by Senator Cummins). In commenting on that report Senator Cummins said as follows:

> Every lawyer understands that we can not delegate to a commission legislative power; that when we give to an administrative body the execution of a law of Congress we must at the same time give it a standard, a guide and rule which it is to apply to the particular case and determine whether that particular case falls under the prohibition of the law. * * * Thus in the Interstate Commerce Commission act we declared that a common carrier shall not charge an "unreasonable" rate for the transportation of persons or property. What is an unreasonble rate Congress has not attempted to determine, but has vested the Interstate Commerce Commission with the authority to ex-

amine and then to determine whether a particular rate is or is not a reasonable and just rate. It might be at once said that the Interstate Commerce Commission has the authority by a majority vote to declare any rate that it may see fit to declare a just and reasonable rate, or otherwise, but that is not expressing it in the form of law. The office of the Interstate Commerce Commission is to ascertain, through an investigation and hearing, whether a particular rate is a reasonable charge for the service rendered by a common carrier. Just so, here we have given in this connection to the Trade Commission a standard, a rule, which is just as well understood in the law as were the words "reasonable rate." It is just as easy to turn either to the civilized sense of mankind or to the law of the land and ascertain what "unfair competition" is as it is to ascertain what a "reasonable rate" is. (Cong. Rec. pp. 11103–4;13045–6;13046–8;13049–51.)

No legislation resulted, but on June 13, 1914, Senator Newlands, chairman of the Committee on Interstate Commerce, and author of the Federal Trade Commission Act, submitted a report to the Senate, to which was appended H. R. 15613, a bill to create an interstate trade commission, etc., passed by the House of Representatives on the 5th day of June, 1914. He reported as a substitute for the House bill Senate bill No. 4160, with added provisions regarding unfair competition as contained in the present Federal Trade Commission Act. In his report Senator Newlands refers to the

expressions of Senator Cummins in the latter's report.

Senator Newlands on the floor of the Senate in explaining his bill referred to the Interstate Commerce Act, and in discussing the phrase "reasonable rate," said that "the determination of what the word 'reasonable' meant was submitted to the Interstate Commerce Commission, just as the meaning of the term 'unfair competition' is here submitted to the Trade Commission * * *."

> Read through the act to regulate commerce and you will find it bristling with just such phrases. (Cong. Rec., 2d sess., 63d Cong., p. 11084.)

As Congress intrusted the Interstate Commerce Commission with power to find when a rate was "unjust" or "unreasonable," so in the Federal Trade Commission Act it empowered the Commission to determine what was an "unfair method of competition." This is clearly evidenced in the reports of the committees in the House and Senate.

In the report of the Committee on Interstate Commerce submitted by Senator Newlands on June 13, 1914 (Rept. No. 597, 63d Cong., 2d sess., p. 13), it is said:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, *leave*

> *it to the Commission to determine what practices were unfair.* It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

In the statement of the managers on the part of the House, submitted with the conference report on September 4, 1914 (Rept. No. 1142, 63d Cong., 2d sess., p. 19), it was stated:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited it would be at once necessary to begin over again. If Congress were to adopt the method of definition it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

The Interstate Commerce Act and the Federal Trade Commission Act then are analogous in the following respects.

Section 5 of the Federal Trade Commission Act provides that, "the commission is hereby empowered

and directed to prevent persons, partnerships, or corporations, except banks and common carriers, subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

Section 12 of the Interstate Commerce Act provides that, "the commission is hereby authorized and required to execute and enforce the provisions of this act." By section 15 the Interstate Commerce Commission there is given general authority to enforce the various provisions of the Interstate Commerce Act by making orders to cease and desist. (*Balto. & Ohio R. R.* v. *U. S. Ex. Rel. Pitcairn Coal Co.*, 215 U. S. 481, 499.) Likewise the Federal Trade Commission is authorized to make orders to cease and desist in cases which in the opinion of the Commission fall within the general rule of substantive law regarding unfair competition. The findings of the Federal Trade Commission as to facts, if supported by testimony, are conclusive.

To recapitulate, it was the intention of Congress to regulate the operations of carriers by the Interstate Commerce Act, and by the Federal Trade Commission act to regulate the operations and transactions of persons, firms, and corporations other than banks and carriers. To one was delegated the regulation of "unjust and unreasonable" practices; and to the other "unfair" methods. In neither case did Congress attempt to define what was "unjust, unreasonable," or "unfair." In both cases the duty of deciding what comes within these general terms was confided to a commission.

The orders of the Interstate Commerce Commission "may be suspended or set aside by a court of competent jurisdiction." Those of the Federal Trade Commission may be "affirmed, modified, or set aside."

In view of these points of substantial similarity it is maintained that the two acts are in pari materia, and that in construing and interpreting the Federal Trade Commission Act the court should apply the rule where the language parallels that has been applied in interpreting similar language in the Interstate Commerce Act.

In considering the decisions of this court reference will be made only to "nonreparation" cases, since the Federal Trade Commission has, concededly, no jurisdiction to compel reparation.

In *Kansas City Southern Railway Company* v. *United States*, 231 U. S. 423, Mr. Justice Pitney stated the rule as follows (p. 439):

> The authority conferred by Congress upon the Commerce Court (act of June 18, 1910; 36 Stat. 539, c. 309; Judicial Code, par. 207) with respect to enjoining or setting aside the orders of the Commission, like the authority previously exercised by the Federal Circuit Courts, *was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred.* [Italics ours.]

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, Mr. Justice Day reiterates the rule (p. 361):

> This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. (*Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, 170.) If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it can not be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission.

In *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, the rule that administrative orders of the Interstate Commerce Commission may not be disturbed by the courts except upon a showing that they are unsupported by evidence, made arbitrarily, exceed delegated authority, or that a constitutional question is involved, is stated in the following language (p. 481):

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland*

> *Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason, amount to an abuse of power.

This court, alluding to the fact that no definitions have been attempted, has nevertheless held that the determination of what is "reasonable" or unreasonable" is a question of fact in a given case and is for the determination of the Interstate Commerce Commission.

> *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 455;
>
> *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196;
>
> *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247, 257, 259;
>
> *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361;
>
> *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

The rule laid down in Interstate Commerce Commission decisions should be applied in Federal Trade Commission cases, since the discretion of the Federal Trade Commission, in determining whether an unfair method of competition exists, is analogous to that of the Interstate Commerce Commission. When, therefore, the findings are "supported by evidence," the only grounds upon which the Circuit Court of Appeals reviews Federal Trade

Commission findings are the three exceptions enumerated in the decisions of this court in "non-reparation" cases.

In its procedure the Federal Trade Commission finds certain evidentiary facts upon which it bases an ultimate fact or conclusion. The findings indicate the "method." This method may rest upon conflicting evidence. So long as the findings are "supported by testimony" they should not be reviewable except as hereinbefore stated.

> *It may be conceded that the evidence would have warranted a different finding;* indeed the first report of the Commission was to the contrary; *but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done.* [Italics ours.] (*Manufacturers Railway Company* v. *United States,* 246 U. S., 457, 482.)

Having found the "method" the Commission determines the ultimate fact as to whether it is "unfair," and hence to be prohibited. This is nothing more than arriving at a conclusion as to whether the evidentiary facts are comprehended within the phrase "unfair methods of competition in commerce." To do this the commissioners "exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly

or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases." (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, supra.)

The Circuit Court of Appeals does not assert that there is a constitutional question involved in this case, nor that in passing on the question of the unfairness of the method the Commission has acted beyond the scope of its authority, nor arbitrarily. Said court, however, did undertake to review the evidence and to determine whether or not the facts proven disclosed a practice that was "unfair," which the Commission maintains is alone for it to determine.

The finding that the method practiced was "unfair" was a further finding of fact in addition to those already found. It involved finding the effect of the acts done as to competitors. It is not disputed that there was evidence pointing to an unfair result. Hence the Circuit Court of Appeals necessarily found the *fact* of "unfairness" for itself and ignored the Commission's finding of such *fact*.

SECOND.

The Circuit Court of Appeals was without jurisdiction to set aside the order of the Federal Trade Commission.

The jurisdictional and procedural part of the Federal Trade Commission Act is set forth in section 5. The first paragraph, stating that "unfair methods of competition in commerce are hereby declared unlawful," is the only substantive law in the act. The second paragraph carries with it the delegation of power to the Commission to enforce the act. The third paragraph contains the procedural part of the act relating solely to the Commission; and the fourth paragraph contains the procedure by which the acts of the Commission may be reviewed by the Circuit Court of Appeals.

It is proposed to measure the decision of the circuit Court of Appeals in setting aside the order of the Commission with the language in these four paragraphs of section 5.

A. What the Court Actually Did by its Order.

As a preliminary to this step, it is necessary first to understand on what grounds the court nullified the Commission's order. In its opinion (Record, p. 480) it declared that "there is testimony to support the findings of fact." Since the determination of whether the acts complained of were unfair is an administrative question, the statement of the court

that the findings were supported by testimony should have foreclosed it from reviewing the Commission's finding of the ultimate fact that the practices complained of were unfair methods of competition within section 5 of the statute.

> *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 455;
>
> *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196;
>
> *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 257, 259.

The court, however, while admitting that the findings of primary facts were supported by testimony, found that the Commission's ultimate finding namely that the method of competition forbidden was unfair, was not within the meaning of section 5 of the Federal Trade Commission Act. To do this, it apparently ignored paragraph 4 of the findings of fact, and sought to reduce it to a finding of merely individual transactions, holding that the Commission did not have jurisdiction over such transactions.

Paragraph 4 of the findings of fact (Record, p. 47) states in part:

> That a great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing States were many times unable to procure ties from any other firm, except Anderson Gratz and Benjamin Gratz, co-partners, doing business under the firm name and style of Warren, Jones & Gratz, or their said agents, P. P. Williams, W. H. Fitzhugh,

and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company, and C. O. Elmer, and that the said respondents sold and distributed such a large proportion of the entire amount of such ties manufactured and sold in the entire cotton growing section of the country, that they, the said respondents, had what amounted to a monopoly of the cotton tie business of the country, controlling and distributing such a large proportion of the entire output of cotton ties that cotton growers found it impossible to bind the cotton grown and produced in the Southern States without applying to and purchasing from the said respondents and their agents almost the entire output of such ties manufactured by the Carnegie Steel Company. The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company, and, in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company, from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

Despite the language in said paragraph 4, and the court's statement that "there is testimony to support

the findings of fact," in a subsequent paragraph of its opinion (Record, p. 481) the court said:

> And we discover no evidence to support the finding in paragraph 2 that the respondents "adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging." It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917 when there was fear that owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties. The evidence is that with these exceptions the respondents sold ties without any restrictions to all who wanted to buy and indeed made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton. It is only these exceptional and individual cases, which established no general practice affecting the public, that can sustain the findings in paragraph 4.

The mere placing of the above paragraph in juxtaposition with the earlier part of the opinion, wherein it is stated "there is testimony to support the findings of fact," presents a contradiction. In the first instance the court recognizes apparently that it is foreclosed by the statute from rejecting the Commission's findings, but subsequently reviewing the testimony deletes the findings of a general practice and declares that they do not support the conclusion which the Commission draws in its ultimate finding, and one that the court holds the Commission had no right to find.

In substance, then, the court said that conduct, illegal if applied to all, can not be forbidden if applied simply to numerous transactions; that though there is evidence to support the findings, yet the court will weigh the evidence, and if it finds exceptions to the illegal conduct it may so declare them of such weight as to nullify the sufficiency of the testimony and prevent the Commission, as a matter of law, from finding that an unfair method of competition had been practiced.

The court said—

> * * * it seems to us that unfair methods of competition between individuals are not contemplated by the act (Record, p. 480); * * * it is only these exceptional and individual cases, which established no general practice affecting the public, that can sustain the findings in paragraph four (Record, p. 481); * * * it seems to us that section 5

> is intended to provide a method of preventing practices unfair to the general public (Record, pp. 480, 481); * * * as we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging and that the Commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed. (Record, p. 482.)

B. The Commission is not required to find a general practice.

Conceding for the sake of the argument only that there was no general practice found by the Commission, it is maintained that a correct reading of section 5 demonstrates that the Court had no authority to set aside the Commission's order.

The substantive part of the section contains no language intimating that the Commission must find a general practice. It says "that unfair methods of competition in commerce are hereby declared unlawful." Had Congress intended to require the finding of a general practice, it would have amended the language so as to read "a general practice of unfair methods of competition."

Moreover, in the second paragraph where the authority is delegated to the Commission to enforce the act, the thing to be prevented would have been a "general practice" of "unfair methods of competition" instead of the unqualified phrase "unfair methods."

Again, in the procedural and administrative part of section 5, in the third paragraph, where the Commission is authorized to issue a complaint when any "unfair method of competition" is practiced, it would have read under the court's definition "a general practice of *any* unfair method." The word "any" would seem to be broad enough to comprehend all unfair methods. This is apparently the way in which the Circuit Court of Appeals for the Seventh Circuit interpreted the act in the case of *Sears, Roebuck & Company* v. *Federal Trade Commission* (*supra*), where Judge Baker said:

> The Commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop *all those trade practices that have a capacity or tendency to injure competitors* directly or through deception of purchasers.

This court in giving definition to unfair methods of practice in commerce has not limited them to acts affecting the public generally or practiced generally. In Hitchman Coal & Coke Co. *v.* Mitchell et al., 245 U. S. 229, 259, Mr. Justice Pitney, speaking for the court in part, said:

> Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should

endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places any court of equity would grant an injunction to restrain this as unfair competition.

Standard Oil Co. v. *United States*, 221 U. S. 1, 42–43;

International News Service v. *Associated Press*, 248 U. S. 215.

C. If the Commission or Courts were to determine that an "unfair method" affected the public they would be usurping a legislative function already exercised by Congress when it declared unfair methods to be unlawful.

The lower court holds that there must be evidence to support a finding that the "unfair methods" complained of affected the public generally. When Congress declared "unfair methods of competition in commerce * * * unlawful," it thereby declared that such unfair methods between individuals affected, to its injury, the public generally. By its fiat Congress made them unlawful. It did so because they were against public policy. Had not "unfair methods of competition" affected the "public generally" Congress would not have outlawed them. Having done so, it relieved the Commission of the necessity of so finding, and hence of introducing evidence to prove facts upon which such a finding could be made.

Undoubtedly Congress looked at this question just as a legislative body does when it makes certain acts a crime, or puts a penalty on certain acts, i. e., qui tam statutes.

Legislatures penalize certain acts because they affect the public generally. The district attorney, however, when prosecuting under such statutes does not have to prove that the act affects the public, nor show why Congress declared it unlawful. No more is the Federal Trade Commission required to show that an "unfair method" affects the public.

This is evidenced by the language in the procedural part of section 5, wherein it is declared that "if upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, etc. * * *." There is nothing in this language requiring the Commission to find that the "unfair method affects the public generally." All it requires is that the Commission shall find whether the method was unfair.

D. Congress granted the Commission discretion as to when it should proceed against one charged with unfair methods of competition.

Congress, however, desired to give the Commission discretion as to when it should issue a complaint, and hence it incorporated in section 5 the following phrase:

> *Whenever the Commission shall have reason to believe* that any such person, partnership,

> or corporation has been or is using any unfair method of competition in commerce, and *if it shall appear to the Commission that a proceeding by it in respect thereof* would be to the interest of the public, it shall issue * * * a complaint.

The phrase, "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public," was inserted to protect the Commission in its administration of the law. Congress undoubtedly saw that the Commission would be deluged with many complaints. This has been the fact. In the great majority of cases the charge is against only one competitor. The purpose of Congress was to give the Commission a discretion so that it could sift out of the applications for complaints those of minor importance. In this way the Commission could escape a deluge and give its time to those of greater importance. Had it not been for this discretion the Commission by the very word "shall" in the act would have been compelled to issue a complaint whenever an application was made. Under the beneficient discretion granted to it in the procedural part of the act just quoted it has been made physically possible to attend to the work of the Commission. It will be further noted that this discretion lodged in the Commission is in the administrative part of the section, and not in the jurisdictional or substantive part.

The administrative part of section 5 says that—

> whenever the Commission shall have reason to believe * * * that a proceeding by it in respect thereof would be to the interest of the public * * *.

Thus it is that the Commission and it alone determines when a proceeding will be in the interest of the public before it issues the complaint.

E. The Circuit Court of Appeals reviewed acts within the discretion of the Commission.

The fourth paragraph of section 5 relates to the matters to be reviewed by the Circuit Court of Appeals when an appeal is taken from the Commission's order. The language is

> upon such filing of the application and transcript, the court shall cause notice thereof to be served upon such person, partnership, or corporation, and thereupon shall have jurisdiction of the proceeding and of the question determined therein.

The word "proceeding" and the words "question determined therein" refer back to the procedural part of section 5, set forth in the third paragraph. There the proceeding begins with the issuance of a complaint. The complaint follows after the Commission has affirmatively resolved two propositions, namely: that it has reason to believe that an unfair method of competition has taken place and that it would be in the interest of the public to issue the complaint.

While the Commission follows rules of its own in resolving these two questions, the action against the respondent does not begin until a complaint issues and is served on respondent.

After the complaint issues the procedural section requires the Commission to take testimony, at which time the respondent is allowed to cross-examine witnesses of the Commission and to put in its own testimony, and the testimony is reduced to writing and a hearing held.

"If upon such hearing the Commission shall be of the opinion that the method of competition is prohibited by this act," it makes its findings and issues an order against the respondent. The action of the Commission to be reviewed begins with the complaint and ends with the order to cease and desist.

In the present case the court invaded the discretionary domain granted to the Commission by Congress at that stage previous to the issuance of the complaint where the Commission determines whether it has reason to believe that an unfair method of competition has been practiced and whether "a proceeding by it * * * would be to the interest of the public," and said in substance that the Commission had no right to issue the complaint since in the opinion of the court the public was not affected generally.

THIRD.

The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the opinion of Judge Baker in the Seventh Circuit in the case of Sears, Roebuck & Company, petitioner, v. Federal Trade Commission (supra).

The lower court's attention was called to the *Sears, Roebuck & Company* case, but it declared that—

> the practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally,

and hence there was a public interest involved, whereas in the case at bar no such showing was made, and, therefore, there was no public interest involved. It is a debatable question as to whether the advertisements of Sears, Roebuck & Company were reaching as large a public and affecting as many people as were affected by the respondents, who were holding a dominant and controlling position in the sale and distribution of steel ties to the extent of about 65 per cent, and also were distributing 45 per cent of the jute bagging used in the cotton industry of the South. At best the question is doubtful. If one were to hazard a guess the preponderance might lie in favor of a greater part of the public being

ultimately affected by the control of the distribution of steel ties and jute bagging.

The lower court has also said that—

> no authority is given to any individual to present his grievances and the Commission is to interpose only in the interest of the public.

The Commission has been unable to find anything in the law that forbids it to act upon the complaint of an individual against a single competitor, if it appears to it that there is disclosed a method of unfair competition. The language of Judge Baker in the *Sears, Roebuck & Company* v. *Federal Trade Commission* case, states the position of the Commission very clearly, where he says:

> The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners, representing the Government as parens patriae, are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers quite irrespective of whether the specific practices in question have yet been denounced in common law cases.

The words of Chief Justice Fuller in *Loewe* v. *Lawlor* (208 U. S. 274, 294–295) states the principle at common law where he says:

> * * * and there is no doubt that (to quote from the well-known work of Chief

> Justice Erle on Trade Unions) at common law *every person* has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction.

If the Commission has the jurisdiction to "stop all those trade practices that have a capacity or a tendency to injure competitors directly," then surely it had the authority to order the respondents in the instant case to cease where they held a dominating position and refused to sell steel ties except where a corresponding amount of jute bagging was bought. The capacity or tendency to injure the competitor who has only jute bagging to sell, which might be of a better or equal quality, but which would be lost in competition with respondents because of respondent's ability to sell owing to the control of steel ties, is so obvious that it does not need elucidation. Such an actual power, coupled with such a practice as it set forth in a letter dated June 24, 1916, to Messrs. P. P. Williams & Company, from Warren, Jones, & Gratz, in which it says:

> Do not sell any ties to any one without bagging to match, as we do not propose to furnish buyers of sugar bags any ties if we can help it. * * * In this way we may possibly be able to control [*y*] supply and prices to some extent. * * * (Record, p. 261.)

must eventually restrain trade and create a situation in which the public is interested.

If the purpose of the Federal Trade Commission Act, as was often reiterated in the debates in Congress, was to stop at their inception practices which led up to restraint of trade, or a tendency to monopolize, the Federal Trade Commission must have the authority to stop all trade practices "that have a capacity or tendency to injure competitors directly," and the public eventually. This, it would appear from the language of the act, the reports and the debates that Congress intended to give to the Commission.

FOURTH.

The Court erred in holding that "there was no evidence to support any general practice of respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of bagging." (Record, p. 481.)

There is no contention on the part of the court that the method of compelling those wishing to buy steel ties to also purchase jute bagging is not unfair. It is only that the testimony did not prove a general practice affecting the public, and that hence the Commission's finding that the unfair method was contrary to section 5 of the Federal Trade Commission Act was erroneous. The Commission maintains that the lower court did not have the power to review the findings on this ground, but if this court should decide otherwise, the Commission submits evidence showing a general practice.

The letter dated St. Louis, Missouri, June 24, 1916, to Messrs. P. P. Williams & Company from Warren, Jones & Gratz, exemplifies a general practice:

> WARREN, JONES & GRATZ,
> *St. Louis, Mo., June 24, 1916.*
>
> Messrs. P. P. WILLIAMS & Co.,
> *Vicksburg, Miss.*
>
> GENTLEMEN: * * * Do not sell any ties to anyone without bagging to match, as we do not propose to furnish buyers of sugar bags any ties if we can help it.

You will have to be very careful about sales, as there is a disposition on the part of buyers to overbuy, and as the supply of bagging and ties this year will be limited, we will have to be very careful not to sell too much to any one party at these opening prices. In this way we may possibly be able to control [y] supply and prices to some extent. * * *

Yours, very truly,

WARREN, JONES & GRATZ.

(Record, p. 261.)

Later—

Messrs. P. P. WILLIAMS & COMPANY,
Vicksburg, Mississippi.

GENTLEMEN: * * * These ties to be sold in every instance only to people who buy at least 30 yards of bagging with each bundle of ties, for the same shipment as the ties.

You must be very careful and not let people like Goyer pick you up on ties without a proportionate quantity of bagging.

As to bagging, do not sell over 1,000,000 yards without further instructions from us, as there is a strong probability of an early advance in both bagging and ties.

Yours, very truly,

WARREN, JONES & GRATZ.

(Record, p. 262.)

WARREN, JONES & GRATZ,
St. Louis, Mo., June 24, 1917.

P. P. WILLIAMS & COMPANY,
Vicksburg, Mississippi.

GENTLEMEN: Last year we sold the Goyer Company a round lot of ties. Please do not

sell them any ties this year except with a proportionate quantity of bagging, as every bundle of ties we see in sight will be needed to go with our bagging, and we do not want to supply people with ties who are using bagging purchased of others. Therefore we shall not write Goyer offering them any ties except with bagging.

Yours, truly,

WARREN, JONES & GRATZ,

(Record, p. 262.)

Mr. H. R. MURRAY,

c/o Warren, Jones & Gratz, St. Louis, Mo.

DEAR SIR: Mr. Taylor, of the Goyer Company, tells me that you have at last consented to sell him:

11,000 bdls. ties.

125,000 yards bagging.

I am glad you did this, and I advised him to send the telegram which he sent you as he seemed to have so much feeling on the subject, and I felt that as he had bought his ties from you or us every year for the past 8 or 10 years that it was up to us to protect him as far as we could. Now, that he has bought this quantity of bagging and ties from you, we will not push him, particularly on ties, in the territory immediately around Greenville, as we had intended to do if he bought elsewhere. * * *

Yours, very truly,

P. P. WILLIAMS & Co.

(Record, p. 263.)

In substantiation of the general practice, the following excerpts are taken from the testimony of those who were refused cotton ties unless they purchased bagging from the respondents:

Mr. G. O. Korndorffer, of the firm of Rumble & Wensel Co., testified as follows (Record, p. 53, 54, 55):

> A. We have represented the Ludlow folks for, I suppose—well I would say 40 years; at any rate the whole 30 years I have been connected with my firm, in Natchez; and last season, 1916, we had an awful time trying to get ties and we could not get any ties from any so-called independents, or Warren, Jones & Gratz, or P. P. Williams & Co., without buying American bagging, and you will see by the bill there [indicating] that we were forced to buy 100,000 yards of American bagging to get ties.
>
> Q. How much bagging were you required to buy in order to get the 5,000 bundles of ties?
>
> A. 100,000 yards of bagging.
>
> Q. At that time state whether or not you were already supplied with bagging.
>
> A. We were, sir.
>
> Q. What kind of bagging did you have on hand?
>
> A. Ludlow bagging, manufactured in Boston, Mass.
>
> Q. How did the Ludlow bagging compare with the American bagging, at that time, as to quality and price?
>
> A. Well, in our section of the country it has a preference over any other bagging.
>
> Q. Which has the preference?
>
> A. The Ludlow.

Q. How did the price compare with the American bagging?

A. Identically the same.

Q. Would you have bought the American bagging, Mr. Korndorffer, but for the fact that you were forced to buy it in order to get ties?

A. No, sir.

Mr. Charles M. Platter, of the firm of Boren & Stewart Co. (Inc.), introduced the following telegram (Record, p. 92):

POSTAL TELEGRAPH-CABLE CO.

67ks od 52 1132am.

A ST. LOUIS, MO., *June 26, 1916.*

BOREN & STEWART CO.,

Dallas.

Telegram received; will book your order for one hundred thousand yards bagging with thirty-three hundred bundles ties to match, but can not sell you six thousand bundles in addition as our supply of ties is limited; we are not selling ties to anyone except with proportional amount bagging. Answer if satisfactory.

WARREN, JONES & GRATZ.

Mr. Ed Brin, manager of the Brin Store at Terrell, Tex., introduced the following letters (Record, pp. 148, 149):

WARREN, JONES & GRATZ,

St. Louis, Mo., June 24, 1916.

THE BRIN STORE,

Terrell, Texas.

GENTLEMEN: Yours of the 24th. While we shall make our opening prices on bagging and

ties next Monday, we can not at this time offer you any ties except with a proportionate quantity of bagging. In other words, if you buy from us 30,000 yards of bagging, we will sell you 1,000 bundles of ties. It is necessary to handle our business in this way owing to our small supply of ties.

Yours, truly,

WARREN, JONES & GRATZ.

WARREN, JONES & GRATZ,

St. Louis, Mo., June 26, 1916.

THE BRIN STORE,

Terrell, Texas.

GENTLEMEN: Your letter of the 24th. Our supply of ties is limited—barely enough to go with the bagging we will sell. It may be possible that we will have some surplus ties after we get through selling ties with bagging, but this is very uncertain. As you are well aware, all steel manufacturers have been crowded with work for the past year or more, and it has been a difficult matter for us to induce any of them to make ties.

Yours, very truly,

WARREN, JONES & GRATZ.

Mr. Brin also testified as follows (Record, p. 158):

Q. What did they say? Did they say they did not have ties at that time?

A. They said they were short of ties and did not have ties except to match the bagging. That is what they wrote me.

Mr. Paul Kling, secretary of H. & C. Newman (Ltd.), cotton factors of New Orleans, testified as follows (Record, p. 186):

> Q. Tell what that conversation was.
>
> A. Mr. Elmer reported that he could not fill an order for, I think it was, 5,000 bundle of ties which he had taken in the morning of the day in question, because Warren, Jones & Gratz declined to fill the order, because we had not purchased any bagging from them.
>
> Q. Now, will you please state approximately the time in 1916?
>
> A. May or June of 1916.

Mr. Kling also introduced the following telegram received by his company from Warren, Jones & Gratz (Record, p. 186):

> Our supply ties limited; manufacturers say impossible increase output; we must use our limited supply to go with our bagging; we are offering all parties in this way, discriminating against none; therefore can not accept your order three thousand bundles.

In reaching its ultimate finding the Commission had necessarily to take into consideration many facts which it could not set forth in the findings, because of limitation of space. It should be remembered that it was known to respondents and the public that there was every promise in the early part of the season of 1916 of a tremendous cotton crop. This fact is admitted throughout respondents' evidence. The respondents refused to sell ties unless bagging were bought until it was evident that the cotton crop

would be much smaller than expected (Record, 264, 265, 266, 272, 371) and there might be some difficulty in disposing of all the supply of ties. Then the respondents sold ties without bagging. (Record, pp. 66, 100, 269, 270, 363, 365.) This becomes important when considering the claim of the respondents that the parties who were refused ties without bagging finally got all the ties they wanted before they were needed by the farmers.

Since respondents knew in the latter part of the season 1916 that the cotton crop was then a failure, the Commission was well within its rights in giving little weight to the evidence tending to show that respondents sold ties without bagging.

For example, on August 30, 1916, the respondents wrote to P. P. Williams & Co. as follows (Record, p. 264):

> DEAR SIRS: Your letter of the 28th. Your assumption is correct: On account of the short cotton crop we are anxious for bagging and tie business.

In the early part of 1917 there were many refusals to sell ties without bagging, similar to the refusals in 1916. (Record, pp. 108, 115, 120, 126, 136, 137, 272, 273, and 363.) The refusals ceased some time in May, but the records of the Federal Trade Commission show that Mr. Robertson, a representative of the Commission, was in Mississippi by this time investigating conditions in other bagging industries. (Record, pp. 137, 190, 271, and 272.)

That the respondents ceased from objectionable practices in May, or sold ties without bagging at that time, might have been due to the fact that the investigation was pending and the Commission was justified in placing little importance on the temporary cessation of respondents' objectionable methods.

The failure to continue the practice was no reason why the Commission's order to cease and desist should not issue. (*Sears, Roebuck & Co.* v. *The Federal Trade Commission, supra.*)

The explanations of Mr. Gratz as to why he refused to sell to various witnesses who testified in this case that they were unable to buy ties without bagging, were not binding upon the Commission, which, in the rightful exercise of its jurisdiction, was warranted in giving little weight to the testimony of an interested witness or even rejecting it entirely. (Record, p. 342 and following.)

The defense of Mr. Gratz that he was trying to prevent speculation by insisting that those who purchased ties should also purchase bagging when the latter already had bagging was not impressive, for if he was stopping speculation by an unfair method of competition, he was undoubtedly doing more harm to the competitor and the consumer than if speculation went unchecked. Since the respondents admittedly dominated the market and fixed the price on new steel ties, it was difficult to see wherein there was a probability of much speculation.

FIFTH.

The manner of sale and distribution of ties and bagging followed by respondents is known as "full-line forcing," and is economically an unfair method of competition, under the public policy evidenced by the Federal statutes.

This country, having adopted the competitive process in business, has declared by its statutes that the economic struggle of manufacturers and distributors to secure the patronage of customers for their products as the most beneficial method for society. It has come to be accepted that fair methods of competition are based solely upon relative production, selling costs, and efficiency, and that unlawful interference with these essentials of competition constitutes unfairness. Paraphrasing a statement of Mr. Justice Pitney in the case of *International News Service* v. *The Associated Press* (*supra*), unfair competition may well be defined as a process amounting to an unauthorized interference with the normal operation of a competitor's legitimate business.

It is obvious that any method employed in competition which produces such interferences must prevent competitive units from competing as severely as their relative costs and efficiency would warrant, and becomes an "unfair method."

Applying this postulate to the findings of the present case, we have some concerns manufacturing bagging and other entirely distinct organizations en-

gaged in the manufacture of ties. Because of the fact that ties and bagging are used together by the ultimate consumer a practice has grown up whereby manufacturers and dealers in bagging frequently, if not usually, supply both ties and bagging together to the purchaser.

This practice, when purely voluntary, is economically desirable from the standpoint of the purchasers. It is a service feature given in connection with the sale of bagging, whereby the purchaser of bagging and ties is enabled to purchase his requirements for these articles from a single organization instead of being compelled to negotiate independently with a seller of bagging and a seller of ties in order to obtain his requirements.

There is nothing violative of the rule of fair competition in the fact that the sellers of bagging also carry ties to accommodate customers desiring to purchase both.

The circumstances involved in the state of facts presented by this record are, however, entirely distinct from those just described. The innocent practice of selling ties and bagging together, evolved as an economic service feature, was transformed by respondents into a weapon of compulsion. Knowing that there was a scarcity of ties, and admittedly having contracted for 98 or 99 per cent, the greater proportion of the new production of the Carnegie Company, the only heavy producer of such ties, Warren, Jones & Gratz declared that they would

supply ties only where a proportionate amount of bagging was purchased from them by those desiring ties.

The practice of supplying ties with sales of bagging when both are sought and ordered, and of supplying ties only on condition that proportionate amounts of bagging are ordered, is in practical effect as far apart as the two poles. Under the one system there is nothing to interfere with the relative efficiency of the manufacturers and sellers of bagging. Each disposes of his bagging on its merits and supplies ties to the purchaser when and if desired. Each manufacturer and seller may sell his bagging on the basis of his costs, prices, quality, adaptability to the uses of the purchaser, and such incidental service as he may see fit to give, and he does this in competition with other manufacturers and sellers likewise so engaged. Some of these purchasers desire regular grades of bagging, some sugar-bag cloth, others secondhand bagging, and yet others rewoven bagging.

From an economic standpoint all are entitled to buy the class they desire and manufacturers and dealers are entitled to whatever volume of bagging business accrues to them by reason of purchasers' preferences, the prices and service which the manufacturers and sellers afford. This is fair competition on the basis of efficiency, for each competing seller will obtain that proportion of the business to which its relative costs and efficiency entitles it in competition with the relative costs and efficiencies of competing organizations.

This method "is wise and in the interest of the public and should be continued," but it is in marked contrast to respondents' method of selling ties only in proportion to the bagging purchased.

Under respondents' system the prospective purchaser of bagging can not select and purchase bagging as and where he may desire and in accordance with the price, quality, and character of the bagging required and the service afforded by the seller. On the contrary, he is compelled to purchase largely, if not entirely, irrespective of these conditions, and to buy to a greater or less extent from the bagging seller or sellers controlling the necessary ties. Not only does this enable those following this method to make any price they may choose, but it necessarily deprives competitors of bagging business which might, and in many cases would, undoubtedly have gone to them had it been possible for prospective purchasers to have purchased on the basis of the price, quality of the bagging, and service of the sellers, irrespective of the matter of ties.

In the lower court counsel for respondents in his brief carefully italicised the following sentence contained in the letter of Gratz to Wallace of July 7, 1916:

> To gain an advantage on our competitors and guard ourselves from disaster, we should have taken the Carnegie Company's whole 1,400,000 bundles, and would have been glad to do so except for *the broader policy protecting the Carnegie Company's trade by giving ties to anyone who had been their customer in years past.*

One may well consider what would have been the result upon competitors of respondents had the Gratz Company been able to purchase as they "would have been glad to do" the entire Carnegie output, and resold the same solely on condition that proportionate amounts of bagging be purchased therewith. This method counsel for respondents characterizes as "wise," in the interest of the public, and "just to both manufacturer and consumer."

The effect of such a system as that employed by respondents is to force upon various concerns and organizations in greater or less proportions, bagging which they would not purchase under other conditions, thereby depriving other bagging sellers of business which they would otherwise obtain were the bagging purchased upon the basis of its price, quality, and service afforded by the seller. *The method, therefore, is clearly violative of the rule of fair competition because respondents by the employment of this method, obstructed, interfered with, and embarrassed competing bagging manufacturers and dealers in making sales of this product.*

They have in greater or less proportion obtained business not upon the basis of the quality and price of their goods and such services as they might render, but upon the basis of an arbitrary requirement made possible by their control of ties. The unfairness of the method is best illustrated by the letter of Warren, Jones & Gratz to P. P. Williams & Co., dated June 24, 1916, which gave the following instructions:

> Do not sell ties to anyone without bagging to match, as we do not propose to furnish buyers of sugar bags any ties if we can help it.

Thus, from the respondents' own words, this court may learn to what extent, in the language of counsel, "the method adopted by the defendants is proper and just to both manufacturer and consumer."

Under such a practice it is obvious that prospective purchasers of sugar-bag cloth neither can nor will continue to buy that commodity if they can not obtain ties. Instead they will be compelled, under the circumstances, to buy jute bagging from respondents. Such a system is both improper and unjust to sugar-bag manufacturers.

Pursued to its logical conclusion, should respondents retain a large control of the supply of ties, they might well run competitors in bagging out of business and produce a practical monopoly or at least a serious restraint of commerce to the public detriment.

It is maintained that the requirement that a proportionate quantity of American bagging bought with each purchase of ties compelled certain purchasers of bagging to buy not in a free and open market, and in accordance with prices, quality of goods, and incidental services of the sellers, on the basis of their control of ties, and with little or no reference to the elements of quality, price, and service. The effect of this was (*a*) to handicap such purchasers by preventing them from securing the goods which they would have purchased in the

absence of such restrictions; (*b*) to prevent other manufacturers of bagging from obtaining that proportion of the bagging business which they would have obtained upon the basis of their relative costs and efficiencies in the absence of the method of respondents; and (*c*) to promote an unfair method of competition.

CONCLUSION.

Wherefore, it is respectfully submitted that the order of the Circuit Court of Appeals be set aside, and that the order of the Federal Trade Commission be affirmed.

ALEX. C. KING,
Solicitor General.
HUSTON THOMPSON,
Federal Trade Commissioner.
CLAUDE R. PORTER,
Chief Counsel of the Federal Trade Commission.

APPENDIX.

Findings of Fact and Conclusions of Law by Commission.

FINDINGS OF FACT.

Paragraph 1.—That Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, one of the respondents, is a copartnership whose principal office and place of business is in the City of St. Louis, State of Missouri; that P. P. Williams, W. H. Fitzhugh and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company, is a copartnership with its principal office and place of business in the city of Vicksburg, State of Mississippi; and that the other respondent, C. O. Elmer, has his principal office and place of business in the city of New Orleans, State of Louisiana; that all of said respondents are now, and were at all times hereinafter mentioned, engaged in commerce among the several States and Territories of the United States in the sale and distribution of steel ties, manufactured and used for the purpose of binding bales of cotton, and jute bagging, manufactured and used for the purpose of covering and wrapping bales of cotton; and that the respondents, P. P. Williams, W. H. Fitzhugh and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company, and C. O. Elmer were, and are general selling and distributing agents for the said Anderson Gratz and Benjamin Gratz,

copartners, doing business under the firm name and style of Warren, Jones & Gratz, in the sale and distribution of said articles of commerce; and that the said Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, were and are the general selling and distributing agents for the Carnegie Steel Company located at Pittsburgh, Pa., in the sale and distribution of steel ties manufactured and used for the purpose aforesaid; and that the said Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, were and are the general selling and distributing agents of the American Manufacturing Company, the principal office of which is in the city of Brooklyn, State of New York, for the sale and distribution throughout the States, commonly known as cotton States, of jute bagging manufact ıred and used for the purpose aforesaid; and that Mente & Company with offices in the cities of New York and New Orleans, and many other persons sell and distribute a material known as sugar bag cloth in interstate commerce throughout the cotton growing States of this country, which material is used for the purpose of wrapping bales of cotton; and that the Carolina Bagging Company, located at Henderson, N. C., manufactures, sells and distributes in interstate commerce, throughout the cotton growing States of this country, what is known as rewoven bagging, and that said material known as rewoven bagging is manufactured and sold by other corporations and copartnerships in interstate commerce.

Paragraph 2.—That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and

style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company; and C. O. Elmer, adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging. The purpose and effect of said policy was to force those dealers, jobbers, and merchants who wished to buy steel ties from the said Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, either through themselves or their general agents, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company and C. O. Elmer, to also buy at the same time from said respondents a corresponding amount of American bagging manufactured by the American Manufacturing Company, of which manufacturing company the the said respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, were the sole selling and distributing agents in all the territory west of the Mississippi River, where cotton is grown and where bagging and ties are sold for the purpose of covering and wrapping bales of cotton.

Paragraph 3.—That the said respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, were and are the sole selling and distributing agents of the Carnegie Steel Company of Pittsburgh, Pa., in the sale and distribution of its entire output of steel ties made and sold for the purpose of binding

bales of cotton; and that the Carnegie Steel Company manufactures and sells annually about 75[1] per cent of all the steel ties manufactured for such purpose in the United States; and that the Carnegie Steel Company sufficiently dominates the cotton tie situation in the United States to enable it to fix and control the price of such ties throughout the country; and that about 45 per cent of the jute bagging required to cover the cotton crop of the Southern States is annually manufactured by the American Manufacturing Company and about 20 per cent by the Ludlow Manufacturing Associates of Boston, Mass., and the remaining requirement for baling the cotton crop, viz, about 35 per cent is made up by the use of second-hand bagging and a material called sugar bag cloth. This cloth, as well as the second-hand or reweven bagging, is in considerable demand by cotton balers and is sold and distributed by dealers throughout the Southern States in active competition with the jute bagging manufactured by the American Manufacturing Company and sold and distributed by the said respondents.

Paragraph 4.—That a great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing States were many times unable to procure ties from any other firm except Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, or their said agents, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company, and C. O. Elmer, and that the said respondents sold and distributed such a large proportion of the entire amount of such ties manufactured and sold in the entire cotton-

[1] See note, p. 2.

growing section of the country, that they, the said respondents, had what amounted to a monopoly of the cotton tie business of the country, controlling and distributing such a large proportion of the entire output of cotton ties that cotton growers found it impossible to bind the cotton grown and produced in the Southern States without applying to and purchasing from the said respondents and their agents almost the entire output of such ties manufactured by the Carnegie Steel Company. The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company and, in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company, from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

CONCLUSIONS OF LAW.

That the methods of competition set forth in the foregoing Findings as to the Facts, in paragraphs 1, 2, 3 and 4, and each and all of them are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers and distributors of jute bagging, and against other dealers and distributors in the material known as sugar bag cloth, and against manufacturers, dealers, and distributors of the bag-

ging known as rewoven bagging and second-hand bagging, in violation of the provisions of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and For Other Purposes;" and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of Section 3 of an act of Congress known as the Clayton Act.

[SEAL.]

WILLIAM B. COLVER, *Chairman.*
JOHN FRANKLIN FORT,
VICTOR MURDOCK,
Commissioners.

THE FEDERAL TRADE COMMISSION ACT.

Section 5 of an act of Congress, approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes." (38 Stat., Chap. 311, p. 719.)

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the

commission shall be of the opinion that the method of competition in question is prohibited by this act it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding

before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in anywise relieve or absolve

any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SIMILARITY OF FEDERAL TRADE COMMISSION ACT AND INTERSTATE COMMERCE ACT, AS SHOWN BY THE PROCEEDINGS IN CONGRESS.

Senator Newlands: Page 11082, Congressional Record, volume 51, part 11; page 11084, Congressional Record, volume 51, part 11; page 11086, Congressional Record, volume 51, part 11; page 11112, Congressional Record, volume 51, part 11; page 11235, Congressional Record, volume 51, part 11.

Senator Cummins: Page 11103, Congressional Record, volume 51, part 11; page 11104, Congressional Record, volume 51, part 11; page 11379, Congressional Record, volume 51, part 11; page 11451, Congressional Record, volume 51, part 12; page 12916, Congressional Record, volume 51, part 13; pages 13004–13006, Congressional Record, volume 51, part 13; page 13047, Congressional Record, volume 51, part 13; page 13050, Congressional Record, volume 51, part 13; page 13063, Congressional Record, volume 51, part 13.

Senator Hollis: Page 12142, Congressional Record, volume 51, part 12.

Senator Lewis: Page 12147, Congressional Record, volume 51, part 12; pages 12925–12926, Congressional Record, volume 51, part 13.

Senator Walsh: Page 13052, Congressional Record, volume 51, part 13.

Mr. Covington: Page 14928, Congressional Record, volume 51, part 15.

Mr. Stevens: Page 14938, Congressional Record, volume 51, part 15.

Report of Senate Committee on Interstate Commerce: Congressional Record, volume 51, part 11, pages 11087, 11089.

Report No. 533, House of Representatives, Committee on Interstate and Foreign Commerce: Congressional Record, volume 51, part 7, page 6714.

Congress intended to provide a broad rule covering all unfair competition and to confer on the Commission power to decide what came within the rule:

Senator Newlands: Page 11084, Congressional Record, volume 51, part 11; page 11090, Congressional Record, volume 51, part 11; page 11107–8, Congressional Record, volume 51, part 11; page 11112, Congressional Record, volume 51, part 11; page 11189, Congressional Record, volume 51, part 11; page 12221, Congressional Record, volume 51, part 12; page 12939, Congressional Record, volume 51, part 13; page 13048, Congressional Record, volume 51, part 13.

Senator Cummins: Page 11104, Congressional Record, volume 51, part 11; page 11388, Congressional Record, volume 51, part 11; page 12653, Congressional Record, volume 51, part 13; page 13006, Congressional Record, volume 51, part 13.

Senator Robinson: Page 11231, Congressional Record, volume 51, part 11.

Senator Hollis: Page 12146, Congressional Record, volume 51, part 12.

Senator White: Page 13108, Congressional Record, volume 51, part 13.

Report of Senate Committee on Interstate Commerce, page 11090, Congressional Record, volume 51, part 11.

Conference Report, pages 14768, 14769, Congressional Record, volume 51, part 15.

Conference Report, pages 14919, 14925, Congressional Record, volume 51, part 15.

The jurisdiction of the Circuit Court of Appeals was intended to be restricted exclusively to questions of *law:*

Senator Cummins: Page 11104, Congressional Record, Volume 51, Part 11; page 11451, Congressional Record, Volume 51, part 12; page 13004, Congressional Record, Volume 51, part 13; page 13007, Congressional Record, Volume 51, part 13; page 13045, Congressional Record, Volume 51, part 13; page 13050, Congressional Record, Volume 51, part 13; page 13063, Congressional Record, volume 51, part 13.

Senator Newlands: Pages 11182–3, Congressional Record, volume 51, part 11; page 12217, Congressional Record, volume 51, part 12.

Senator Kenyon: Page 13156, Congressional Record, volume 51, part 13.

Mr. Sims: Page 14940, Congressional Record, volume 51, part 15.

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